IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 29 OF 2006

SHRI ULHAS SOMA DHARGALKAR, BARDEZ, GOA ....Appellant

Versus

STATE OF GOA ....Respondent

Mr. Premanand A. Kholkar, Advocate for the Appellant.
Ms. Winnie Coutinho, Public Prosecutor for the State.

Coram:- N. A. BRITTO, J.

Date:- 21st June, 2006

ORAL JUDGMENT

This is an appeal filed by the surety of the accused whose bond was forfeited and the entire amount due thereon had been ordered to be recovered.

2. Some facts are required to be stated to dispose of the present appeal. The accused was convicted by the learned Special Judge under Section 18 of the NDPS Act, 1985. The accused filed an appeal before this Court and by Order dated 15.01.2004, the accused was ordered to be released on bail on furnishing a personal bond of Rs.50,000/- with one surety in the like amount to the satisfaction of the learned Special Judge, Mapusa, and accordingly, the accused and the surety executed the said bonds.

3. The appeal filed by the accused came to be dismissed on 20.08.2004. It appears that although the accused was released on bail, the accused did not attend this Court during the hearing of the said appeal and, on the contrary, it does appear that the accused also left the jurisdiction of this Court, without its permission. The accused also did

not take any exemption for non-appearance on the dates the appeal filed by him came to be heard and finally disposed on 20.08.2004. Consequently, the accused was directed to surrender before the learned Special Judge forthwith, which direction the accused again did not comply. It appears that the learned Special Judge first issued non-bailable warrants against the accused and thereafter proclamation but yet the accused did not surrender, as required by this Court. As a result, the learned Special Judge, asked the surety (the appellant herein), to produce the accused. The surety received the notice dated 09.09.2005 to appear on 19.09.2005 along with the accused but the surety was unable to produce the accused on that day, presumably because the surety had allowed himself to lose contact with the accused. On that day, the surety sought time and again on 28.09.2005. On 03.10.2005, the surety again could not produce the accused but he made a statement that the accused had expired. In fact, as the death certificate prouced by the surety and the affidavit filed by the brother of the accused shows, the accused died on 15.10.2005. The incorrect statement made by the surety on 03.10.2005, before the learned Special Judge, was sought to be explained by the surety by stating that he had made inquiries about the accused with his brother Shri Bhagat Singh, who was residing at Guirim, Goa, and he had learnt that the accused was sick for last several months and was shifted to Rajasthan, to his native place, since the accused was a permanent resident there. Said Shri Bhagat Singh could not give him any further details and the surety was told by him to contact his elder brother Shri Amar Singh at Rajasthan in order to find out the details of the accused and also gave the contact number of his brother, the said Amar Singh, and on account of telephonic disturbance and language problem of the brother of the accused, the surety could not hear the brother of the accused properly and drew inference from the telephonic conversation that the accused had expired and accordingly had made the said statement before the Court on 03.10.2005. The death certificate of the accused along with the affidavit of the brother of the accused were filed before the learned Special Judge on 21.11.2005.

4. On behalf of the surety, Shri Kholkar, the learned Advocate has

submitted that the accused was a sick person as he was suffering from HIV. Learned Advocate submits that considering the efforts made by the surety, the learned Special Judge, ought not to have recovered the entire amount. According to the learned Advocate, there was scope for reduction of the amount of the bond executed by the surety. On the other hand, the learned P. P. Ms. Coutinho, has left the matter of reduction to the discretion of the Court and at the same time has placed reliance on the decision of the Apex Court in Mohammed Kunju & anr. v. State of Karnataka (AIR 2000 S.C. 6). That was the case where a foreigner was involved and he had slipped out of the country. There were two sureties. The Apex Court observed that each surety was liable to pay the entire surety amount and could not claim to share surety amount by half and half. The Apex Court also referred to sub-section (3) of Section 446 of the Code of Criminal Procedure, 1973, and stated that the said provision empowered the Court to grant such remission since that was within the discretion of the Court but the same ought to be exercised judicially and for good reasons. The Apex Court in that case observed that the offences charged against the foreign national were not trivial nor they were very serious comparatively. In fact, in that case, the said accused was charged under Section 466 and 471 I.P.C. and under the registration of Foreigners Act and The Passports Act, 1967. The Apex Court observed that there was no allegation that the surety had any remote scent that the accused was prepared to escape from India nor that he had connived with the accused jumping out the bail and, therefore, proceeded to remit the penalty from Rs.25,000/- to Rs.5,000/-.

5. There is no dispute that the accused was suffering from HIV, as can be seen from the Order of this Court dated 05.08.2002 in Criminal Misc. Application No. 111/02 and one is certainly to assume that the surety knew about the said condition of the accused. In my view, the surety herein appears to have been a defaulter surety in that, the surety initially did not even ensure that the accused attended this Court when the appeal of the accused came up for hearing and although one of the brothers of the accused was residing in the same Village where the surety

is residing too, took no steps to ensure that the accused did not leave the jurisdiction of this Court. It is contended on behalf of the surety that the condition that the accused should not leave the jurisdiction was one of the condition which was imposed by the learned Special Judge in the case in which the accused was being tried and not by this Court by Order dated 15.01.2004. Nevertheless, it must be understood that it is an implied condition of the bond that as long as the accused is on bail, he should reside within the jurisdiction of the Court granting him bail and in case the said jurisdiction is to be changed, an accused ought to take required permission from the Court. Thereafter, the accused also did not surrender as required by this Court, forthwith and, in that regard also, it does not appear that the surety took any initiative to ensure that the accused surrendered. On the contrary, it does appear that the surety made an incorrect statement before the learned Special Judge on 03.10.2005, that the accused had already expired and that was possibly with a view to avoid his liability. The explanation given by the surety and reproduced hereinabove, from the reply filed by the surety, does not appear at all to be convincing, for after all, one of the brothers of the accused was still residing in the same Village as that of the surety and would have certainly known whether the accused had expired in case he really had expired on or prior to 03.10.2005.

6. Considering the totality of the facts of this case, in my view, there is no case for reduction of the amount due by the surety on the bond executed by him on 23.01.2004. There is no merit in this appeal, consequently, the same is hereby dismissed.

N. A. BRITTO, J.

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